

EFFECT OF WAIVER AT PRELIMINARY HEARING

Robison v. Superior Court,
49 Cal. 2d 186, 316 P.2d 1 (1957)

The defendant, entering an apartment which the police were watching, was searched by the police without a warrant and a narcotic drug was found upon his person. Following the hearing the defendant applied for a writ of prohibition to restrain the trial court from trying him for violating the health and safety code. The court held that, when the defendant failed to object at the preliminary hearing to the admission of this evidence, secured by an illegal search and seizure, the committing magistrate properly considered the presence of the drug in establishing probable cause to hold the defendant over for trial.

The prohibition of the fourth amendment to the federal constitution against unreasonable searches and seizures is enforceable against the states through the due process clause of the fourteenth amendment, but, so long as this protection is in some way preserved, a state may allow admission of such illegally obtained evidence in its criminal prosecutions.¹ California has adopted the view that such evidence is inadmissible in its courts.² However, this guarantee is a right which may be waived, as in the instant case, by failing to object to this illegally obtained evidence when it is offered at the proceedings.³ The question arises then whether this waiver at the preliminary hearing will also suffice as a waiver when the evidence is introduced at the trial.

California does not require that a motion be made prior to the trial to exclude evidence obtained through an illegal search and seizure,⁴ although some jurisdictions, following the "exclusionary rule," do require such a motion.⁵ Therefore, this objection may be raised at the trial unless the waiver at the preliminary hearing is final.

This preliminary hearing is not a trial as such.⁶ It is a constitutionally guaranteed proceeding in California,⁷ the purpose of which is to determine whether a public offense has been committed and whether there is sufficient cause to believe the accused guilty thereof and to hold

¹ *Wolf v. Colorado*, 338 U.S. 25 (1949). The decision was by a divided court.

² *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905 (1955). This is the so-called "exclusionary rule" which prohibits admission of evidence obtained through an illegal search and seizure. A discussion of this viewpoint may be found in Annot., 50 A.L.R.2d 531 (1956).

³ *Ibid.*

⁴ *People v. Berger*, 44 Cal. 2d 459, 282 P.2d 509 (1955).

⁵ *United States v. Wernecke*, 138 F.2d 561 (7th Cir. 1943).

⁶ *State ex rel. Kennon v. Hanley*, 249 Wis. 399, 24 N.W.2d 683 (1946).

⁷ CAL. CONST. art. I, § 8. This right to a preliminary hearing did not exist at common law. *State v. Solomon*, 158 Wis. 146, 147 N.W. 640 (1914). There is no federal constitutional right that requires preliminary hearing to be given, *Burrall v. Johnston*, 53 F. Supp. 126 (N.D. Cal. 1943).

him over for trial.⁸ It serves to weed out groundless or unsupported charges and to relieve the accused of degradation and the expense of a criminal trial.⁹ Nevertheless, the defendant has the same right to present his defense at the hearing in order to determine the reasonableness of the search as he does at the trial of the case.¹⁰

Here, as at the trial, these rights may be waived and the accused, by failing to object to the preliminary proceedings before the magistrate and by failing to move to set aside the information subsequently filed, may waive the irregularities of proceedings before the magistrate and the insufficiency of the evidence received at the preliminary hearing.¹¹ He may even waive the preliminary hearing itself.¹²

Now assuming that the question of waiver is no longer in dispute and the information has been filed against him, should he still have the right to object when it is offered at the trial? Surely certain rights are lost by failing to assert them, as where the defendant's statement, voluntarily offered at the preliminary hearing, is relevant again at the trial. The defendant could not object to the use of this sworn statement where even an unsworn statement, given out of court, might be proved.¹³ Therefore, this result does not find its basis in the nature of the preliminary hearing itself.

The concurring judge in the instant case assumes that this illegally obtained evidence may be kept out at the trial. Such is the import of other cases substantially similar in their facts. In an action to dismiss the information, the court held that, by failure to make an objection to the introduction of marijuana into evidence at the preliminary hearing, the defendant had waived (for this purpose) his right to assert that the narcotic was inadmissible because illegally obtained. However, the court proceeded to discuss the purported illegality saying that "upon trial the objection may well be made and we feel required to comment upon the merits."¹⁴ Likewise in *Priestly v. Superior Court*,¹⁵ the court allowed an objection at the preliminary hearing saying that the defendant cannot be denied the right to object at this proceeding on the grounds that the right can be properly asserted at the trial.¹⁶

Whether one should be required to object to inadmissible evidence at the preliminary hearing or be permitted to object for the first time to

⁸ *Jaffe v. Stone*, 18 Cal. 2d 146, 114 P.2d 335 (1941).

⁹ *Priestly v. Superior Court*, 319 P.2d 796 (Cal. App. 1958).

¹⁰ This was the court's holding in *People v. Lawrence*, 149 Cal. App. 2d 435, 308 P.2d 821 (1957) as concerns hearings on *voir dire*. This same reasoning was adopted as to preliminary hearings in *Priestly v. Superior Court*, *supra* note 9, at 801.

¹¹ *Application of Berry*, 43 Cal. 2d 838, 279 P.2d 18 (1955).

¹² *Ex parte Gregory*, 86 Cal. App. 10, 260 Pac. 320 (1927).

¹³ *People v. Kelley*, 47 Cal. 125 (1873).

¹⁴ *People v. McFarren*, 155 Cal. App. 2d 383, 317 P.2d 998 (1957).

¹⁵ *Supra* note 9.

¹⁶ *Priestly v. Superior Court*, *supra* note 9.

its admission at the trial, would be of little practical importance where the defendant was equally represented at the hearing or fully apprised of his rights. However, as in jurisdictions requiring pre-trial motions,¹⁷ some provision must be made for the defendant who did not have the opportunity or knowledge to assert his right, *i.e.*, the accused who was hastily arraigned without counsel and who himself lacked the understanding of the legal processes. Therefore, it might be wiser from an administrative viewpoint, to make all such evidence open to objection at the trial rather than attempting to specify the instances in which the right was not waived by failing to assert it at the preliminary hearing.

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¹⁷ Annot., 50 A.L.R.2d 531 (1956).